Supreme Court, U.S.
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No. 92-1940

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ANTHONY S. MONTELEONE, et al.
Petitioner,

v.

MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SOLANO JUDICIAL DIST., et al.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO BRIEF OF RESPONDENT STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed December 8, 1992]

MARY ANN CUMMINS MONTELEONE, Petitioner-Appellant, v. MUNICIPAL COURT CA COUNTY OF SOLANO NORTHERN SOLANO JUDICIAL DISTRICT, et al., Respondents-Appellees.	No. 91-16725 D.C. No. CV-90-01448-LKK
ANTHONY S. MONTELEONE, Petitioner-Appellant, v. MUNICIPAL COURT CA COUNTY OF SOLANO NORTHERN SOLANO JUDICIAL DISTRICT, et al., Respondents-Appellees.	No. 91-16804* D.C. No. CV-90-01447-LKK MEMORANDUM**

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Submitted November 23, 1992***

Before: SCHROEDER, FLETCHER and NOONAN, Circuit Judges

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* We consolidate these cases on our own motion.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

*** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Mary Ann Cummins-Monteleone and Anthony S. Monteleone appeal the district court's denial of their 28 U.S.C. § 2254 habeas petitions. They have both been released from custody since the district court denied their petitions, and have only to pay a $60,000 fine to complete their sentences. Because they are not presently in custody and have not demonstrated that they face future custody, this court lacks jurisdiction to consider their appeals. See Rule 2, Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254; Dremann v. Francis, 828 F.2d 6, 7 (9th Cir. 1987) (per curiam); see also United States v. Michaud, 901 F.2d 5, 7 (1st Cir. 1990) (per curiam). Therefore, we dismiss their appeals as moot.

DISMISSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MARY ANN CUMMINS-MONTELEONE,

Petitioner,

vs.

MUNICIPAL COURT OF CALIFORNIA, et al.,

Respondents.

_____/

No. CIV S-90-1448 LKK GGP P

FINDINGS AND RECOMMENDATIONS

[Filed 8/29/91]

I. INTRODUCTION

Petitioner was convicted in state court (Solano County Municipal Court) on six counts of violations of the state Revenue and Taxation Code §§19406, 19401 (a). After a lengthy pretrial process occasioned by continuances requested by petitioner to seek counsel, petitioner was compelled to represent herself. Petitioner chose not to participate at her trial. Petitioner was found guilty of wilfully failing to file state tax returns. All counts were prosecuted as misdemeanors; petitioner received three consecutive one year sentences. Petitioner also states that she was sentenced to additional time in jail because she was unable to pay a fine (jail time imposed at a rate of $30.00/day). Petitioner's sentence per se is

not at issue in this habeas corpus petition.[1/]

Petitioner raises three issues in her habeas petition:

1. She was denied her Sixth Amendment right to counsel (the trial court did not give her sufficient time to acquire counsel and improperly sought to have her "swear" to her financial condition to qualify for appointed counsel);

2. Petitioner's trial was held in violation of the vicinage rights of the Sixth Amendment;

3. Petitioner was improperly arraigned (Sixth Amendment).

The facts relating to each issue are set forth in individual sections. The state concedes exhaustion of the issues set forth in this petition. For the reasons given at length herein, the petition for habeas corpus should be denied.

II. THE SIXTH AMENDMENT RIGHT TO COUNSEL

A. Facts

The First Continuance

On October 9, 1988, complaint No. F84282CR was filed in Solano County Municipal Court. Appendix to Answer, Exhibit 1.

Petitioner appeared for arraignment on April 4, 1989. During this short hearing, petitioner represented that she was "working on" acquiring counsel. She was advised that she was charged with six counts of failing to file a state

---

1. Petitioner's husband was convicted of identical charges. He also was compelled to represent himself after numerous continuances had been granted for the purpose of acquiring counsel. He has filed a habeas petition almost identical to the one discussed here (CIV-S-90-1447 LKK). The Findings and Recommendations for that case will be filed separately.

income tax return and also given police reports related to the charge. The matter was continued to April 25, 1989, so that she could appear with counsel. Appendix to Answer, Exhibit 3. RT April 4, 1989.[2/]

The Second Continuance

On April 25, 1989, petitioner's matter was continued again. She again represented that she was working on acquiring counsel, that she had sent out 25 letters with about six negative responses. Petitioner sought a continuance to acquire counsel but refused to waive her rights to a speedy trial. The matter was continued to May 9, 1989. RT April 25, 1989.

The Third Continuance

By May 9, 1991, petitioner still had not retained counsel. She again explained to the court that the attorneys that she had written to were not responding to her letters. The court advised:

> In other words, you go to a lawyer, you talk to an attorney, he quotes you a fee, and you pay him, and you have a lawyer. That's the way it works. Writing a letter will not cut it. They're not going to listen to you in a letter, because you haven't paid them anything. So I suggest, if you know an attorney, contact him or her. If not, look in the phone book, consult with an attorney and arrange some type of fee arrangement.

RT May 9, 1989, 3:11-19.

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2. Unless otherwise indicated, the reporter's transcripts are contained within Exhibit 3 of the Appendix to the Respondent's Answer.

The case was continued to May 22, 1989, so that petitioner could get a lawyer. Petitioner was informed that this was the last continuance. RT May 9, 1989.

The Fourth Continuance

Petitioner appeared on May 22, 1989, and in the company of James Fracchia, attorney. The pertinent colloquy is as follows:

> Mr. Fracchia: In this matter, she's been in contact with our office about the possibility of retaining us. She's not done so yet. She advised me she had counsel and plea this morning, and I indicated that I would contact the court and --
>
> The Court: When is she going to retain you?
>
> Mr. Fracchia: Well, at this stage, there's two things going on. We're reviewing defenses with Ms. Cummins; and also, she has not yet retained us. I would ask two or three weeks for that to be put over.

RT May 22, 1989.

The matter was continued to June 19, 1989.

The Fifth Continuance

On June 19, 1989, Mr Fracchia contacted the court stating that "he's still looking it over." The case was continued until July 25, 1989. RT June 19, 1989.

The Sixth Continuance

Petitioner appeared on July 25, 1989, without counsel, but explained to the court that she had discussed her case with an attorney (Fracchia). However, Fracchia had not reviewed the material yet. Petitioners was informed:

> The Court: We can't keep putting the matter over. It started in April and -- You might want to try another lawyer if--
> Ms. Cummins-Monteleone: I have worked so hard with him, and I feel good with him.
> The Court. He's not in court. See, that's the problem. Until he appears in court, he can't do this case. We put the matter over, this is the sixth time we've had it on for counsel and plea starting in April, and you still don't have a lawyer.

Nevertheless, the matter was put over to August 15, 1989, so that she could be present with her lawyer. RT July 25, 1989.

Seventh Continuance

On August 15, 1989, petitioner appeared in court without a lawyer. An increasingly exasperated trial judge was again told that although she was working diligently to obtain a lawyer, she had not yet been successful. In response to the judge's question, she stated that she had the funds to retain counsel, but that with a few exceptions, the lawyers were too busy or could not take her case (she did not explain why she had not retained the lawyers that could take her case). Petitioner stated that she thought she had made a "breakthrough" with two lawyers; the matter was continued two weeks to August 29. 1989.

The Case is set for Trial

On August 29, 1989, petitioner appeared without counsel. The court stated:

> I've never, in seven years on the bench, seen anybody take as long as you to hire a

> lawyer. There's an indication that you probably are a person who's trying to delay the system for your own benefit, and from what I saw from the co-defendant [her husband] in court.

RT August 29, 1989, 13:2-6.

The court went on to finally find that she had been abusing the system, and entered a plea of not guilty on her behalf. Trial was set for September 19, 1989.

Despite having stated at the previous hearing that she had the funds to retain counsel, petitioner then asked the court to appoint counsel. The court asked petitioner to fill out the financial form. The following colloquy ensued:

> The Court: All right. Fill out a financial declaration under penalty of perjury, and I'll recall your case to see if you qualify.
>
> Ms. Cummins-Monteleone: Your Honor, on filling out that form, I think that I might be under self-incrimination if I do that.
>
> The Court: It's not self-incrimination. Everybody in the State of California, should they seek the assistance of a public lawyer, it's required by the Court, has to fill out a form.
>
> Ms. Cummins-Monteleone: Well --
>
> The Court: Basically, the form sets out your assets. If you're telling me you make $75 a week, you don't have a problem, put $75 on the form.
>
> Ms. Cummins-Monteleone: The IRS, I believe, has me under investigation, and

filling out the form could be a form of self-incrimination.

The Court: I'm not concerned about collateral self-incrimination. I'm sure the IRS knows how much you earn, essentially, if you work for the FAA.

Ms. Cummins-Monteleone: Well, Your Honor, if you want me to fill that out, could you appoint me counsel to talk to me to fill that out?

The Court: No.

Ms. Cummins-Monteleone: I'm afraid I'll be self-incriminating myself.

The Court: If you want me to appoint a Public Defender, you'll have to fill out a financial declaration.

You say you work for the FAA?

Ms. Cummins-Monteleone: FAA.

The Court: Full time?

Ms. Cummins-Monteleone: Yes.

The Court: What are you a GS-0? You work full-time for the FAA and make $75 a week?

Ms. Cummins-Monteleone: Well, Your Honor, I believe that the IRS has -- I think it's called a levy.

The Court: The Federal Government has a levy against your wages?

Ms. Cummins-Monteleone: Uh-huh.

The Court: Well, I need that alleged in the form so I can figure out what you earn.

Ms. Cummins-Monteleone: Is that form

taking an oath?

The Court: You'll sign it under penalty of perjury like everyone else in the State of California.

Ms. Cummins-Monteleone: If it's taking an oath, I can't take an oath. Its against my religion to take an oath.

The Court: You can affirm it.

Ms. Cummins-Monteleone: And affirming is taking an oath.

The Court: Then I can't appoint you a lawyer. Seems like this is a continuing pattern, trying to manipulate the Court. At some point, it's got to come to an end.

You tell me you work for the FAA making $75 a week, you say it's a fifth amendment privilege because the Federal Government is after you. I say you have to sign it under penalty of perjury, you say you can"t swear. Then I say you can affirm it under perjury, and you say you can't affirm. Then I can't help you.

Ms. Cummins-Monteleone: Could you guarantee me on the record I'm not swearing if I sign that paper?

The Court: I can guarantee you that the document speaks for itself.

Ms. Cummins-Monteleone: Couldn't guarantee me it's not an oath?

The Court: It's an oath. If you lie on that form, the District Attorney can prosecute

> you for perjury, felony perjury, yes.[3/] That's because the taxpayers don't want to pick up the bill for attorneys for those who don't qualify for public assistance of the Public Defender. That's the bottom line.

RT August 29, 1989, 15:3-17:18.

The court notes that petitioner herein signed her present habeas petition under penalty of perjury without any problem at all.

Petitioner was told to get a lawyer by the trial date -- September 19, 1989. RT August 29, 1989.

The Eighth Continuance

On September 19, 1989, petitioner appeared without counsel. She filed a disqualification motion against the trial judge, which under state law is automatically granted upon a first request. After discussing the counsel matter again, the jury trial was continued to the next day. RT September 19, 1989.

Trial

On September 20, 1989, petitioner appeared with her husband. She informed the court that she had retained counsel (Fallman), but that he could not appear on account of civil depositions. Petitioner informed the court that she had just retained him "a couple days ago." RT September 20, 1989, 3:17-5:14. The court refused to

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3. This court views the trial court's definition of "oath" as a statement in the generic sense to tell the truth. Petitioner has no right to ask the court to guarantee that a statement under penalty of perjury will satisfy her religious scruples.

grant a continuance based on the fact that the attorney had not requested the continuance himself. RT September 20, 1989, 25:3-24.[4]

A further, lengthy discussion took place concerning appointed counsel. For the most part, this discussion was an extended repeat of the discussion quoted above, see, infra, IIC. Neither petitioner nor her husband would sign the appointment of counsel form under penalty of perjury. No matter what word was suggested to describe what act would be performed by signing the document, the act was found to be offensive to their (petitioner and her husband) religious beliefs. RT September 20, 1989, 6-23. Petitioners were convicted at trial after refusing to participate in the trial.[5]

Sentencing

Sentencing was continued by the trial court in order for petitioner to appear with the counsel that she had

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4. Petitioner stated to the court that her counsel arrangement was just finalized "the other day". In a declaration filed by the attorney (Fallman) in the state habeas proceeding, the attorney related that he had agreed to represent her on August 22, 1989, if she would pay the fee. Addendum VII to state habeas petition. The declaration continues in a confusing manner that he again agreed to represent the petitioner on September 19, 1989, if she would pay the agreed upon retainer. The lawyer stated that he had civil business to conduct on the scheduled day of the trial. The lawyer declared that if a continuance had been granted, and if petitioner had paid him the retainer, he would have taken the case. This court has accepted these facts.

5. It does not appear from the record that petitioner was given any Faretta (waiver of counsel) rights. However, that issue was not raised in the state habeas petition, nor is it raised here. Therefore, it will not be discussed. Moreover, it is apparent from the record that petitioner knew of the problems in representing herself.

retained. RT September 20, 50:5-51. On October 3, 1989, the matter was again continued because petitioner's attorney did not appear. Petitioner explained that her attorney was going to handle the "new trial" for them (assuming their motion was granted) -- she did not have the funds to retain him for the new trial motion. The matter was continued again to October 24, 1989, so that attorney Fallman could appear at the motion for new trial hearing and sentencing. RT October 3, 1989, p. 57-58. On October 24, 1989, petitioner appeared; her attorney was in the courtroom but was not representing her because he would only represent her if she received a new trial. RT October 24, 1989, p. 59-61.

The sentencing judge denied the motion for new trial and proposed to place petitioner on probation and ninety days concurrent jail time if the petitioner filed tax returns as a condition of probation. Petitioner refused probation on these terms, and was thereafter sentenced to other maximum time permissible under state law.

B. The Trial Court Did Not Err In Refusing To Grant Any Further Continuances

The entire legal issue is summed up in the case of United States v. Kelm, 827 F.2d 1319 (9th Cir. 1987) (a failure to file tax return case):

> When a criminal defendant's constitutional right to secure counsel of his choice conflicts with the trial judge's discretionary power to deny continuances, the reviewing court must balance several factors in "fair and reasonable." United States v. Studley, 783 F.2d 934, 938 (9th Cir. 1986). Where a

> defendant's conduct is "dilatory and hinders the efficient administration of justice," a court may deny a continuance even if it results in the defendant's being unrepresented at trial. United States v. Leavitt, 608 F.2d 1290, 1293 (9th Cir. 1979).

United States v. Kelm, 827 F.2d at 1322.

The factors set forth at footnote 2 of the Kelm opinion are: inconvenience to the witnesses, parties, court; whether other continuances have been granted; whether legitimate reasons exist for further continuances; whether the delay is defendant's fault; and prejudice to the defendant.

There does not need to be an extensive discussion of these factors in light of the factual record in this case. It is quite obvious that the prosecution and its witnesses were being inconvenienced as well as the court. Many continuances have been granted. The trial court found that the petitioner had been purposefully dilatory in her request for yet more continuances. Finally, although the defendant was prejudiced in her self-representation, if this factor was dispositive, a trial court could never deny a continuance of trial when counsel had not been retained.

This court has never witnessed judicial patience of the sort exhibited by the Solano County bench. Petitioner's case was no rush to justice. Petitioner's habeas petition is completely lacking in merit on this ground.

C. The Trial Court Did Not Err In Refusing To Appoint Counsel

Petitioner does not contest, nor could she in a

federal habeas petition, that state law required the signing of the financial form under the penalty of perjury. Given that state law mandated the penalty of perjury requirement, the issue here is whether the Sixth Amendment is violated when counsel is not appointed on account of a defendant's failure to execute the form.

Several federal cases have grappled with this issue. United States v. Ellsworth, 547 F.2d 1096 (9th Cir. 1976); United States v. Gravatt, 868 F.2d 585 (3rd Cir. 1989); United States v. Saroun, 834 F.2d 1358 (7th Cir. 1987). All three cases require defendants to fill out the financial affidavits under penalty of perjury, see, e.g., Gravatt, 868 F.2d at 591. The three cases recognized that information on the form could pose Fifth Amendment self-incrimination problems, but that those problems could be worked out by sealing the form or holding in camera hearings. Self-incrimination is not at issue in the present petition.[6/]

Thus, the only issue concerning execution of the financial affidavit is whether the trial judge unreasonably required a signature under penalty of perjury. Both sides to this dispute cite Gordon v. State of Idaho, 778 F.2d

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6. Although petitioner referenced a self-incrimination concern in the trial court, she did not exhaust the issue in her state habeas proceeding. This court has fully reviewed the papers filed with the California Supreme Court; the only issue raised with respect to appointed counsel is the issue concerning "swearing" to the accuracy of the form. This court cannot review an unexhausted issue that was not fairly presented to the California Supreme Court. Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986). This court offers no opinion on the outcome if the issue had been raised in the state habeas proceedings.

1397 (9th Cir. 1985)[7]. In Gordon, the trial court had dismissed a civil action because the plaintiff had refused to swear or affirm before testifying at his deposition. The Ninth Circuit reversed noting that when one's First Amendment rights run counter to governmental rules or policies, the government must use the least restrictive means possible to accomplish its important policy in order for its rules to pass muster under a First Amendment analysis. The court held that a precise verbal formula was unnecessary to accomplish the purpose of impressing the witness with the need to tell the truth. However, not mentioned by petitioner, is the further holding of the court that an agreement by the plaintiff to testify under penalty of perjury with the knowledge that he could be prosecuted for perjury was appropriate. Gordan, 778 F.2d at 1401. It is clear that the trial court only wanted the petitioner here to execute the financial declaration under penalty of perjury. The trial court suggested numerous ways for this to be accomplished. In addition to the previously quoted colloquy, the later colloquy occurred:

> Ms. Cummins-Monteleone [referring to the appointment of counsel for her husband]: "You're stating that the only way you will give him counsel is for him to sign it under penalty of perjury?
> The Court: Right.

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7. Respondent cited this case in his index of cases, but his brief is devoid of reference to the case. It appears that respondent's counsel did little more than copy the district attorney's brief in state court, and present it to this court. Moreover,k Respondent's general reliance on state cases in this federal habeas proceeding has been unhelpful.

Ms. Cummins-Monteleone: All right.
The Court: That's the way it works. (Petitioner's husband then went on stating that he wanted to sign it under duress)

RT September 20, 1989, 17:13-18.

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The Court: Do you understand that you're signing that under penalty of perjury? For the record, do you understand that?
Mr. Monteleone: That's an unsworn statement. That's not--
The Court: we can swear you and make it formal. I mean, I want to satisfy you. (emphasis added).
Mr. Monteleone: I refuse...

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The Court: Let me ask you this: Do you understand, by signing this, that you're signing it under penalty of perjury?
Mr. Monteleone: No, I don't.
The Court: You don't understand it?
Mr. Monteleone: No, I don't.
The Court: What is it you don't understand?
Mr. Monteleone: I understand that's a sworn statement, and you can't force me to take an oath.

RT September 20, 1989, 20:15-21:8.

This colloquy and the previously quoted colloquy clearly demonstrate that the trial court was attempting to utilize the least restrictive means possible to accomplish the purpose of having the document executed under penalty of perjury. The trial court was willing to call it anything that the petitioner and her husband wanted. However, both the petitioner and her husband (who were conferring together during this colloquy as reflected in the record) were simply not willing to perform any task that might get them counsel and get the trial started. The court again notes that petitioner herein signed her petition to this court under penalty of perjury without any problem being raised in this action. This fact coupled with a review of the record clearly shows that petitioner was not being deprived of any First Amendment right when she was asked to sign the form under penalty of perjury.[8/]

Moreover, this court notes the recent Supreme Court case of Employment Div. of Human Resources v. Smith, 110 S.Ct. 1595 (1990), which significantly lightened the burden to be borne by a state when its law becomes entangled with a person's professed religious beliefs. It may well be that Gordon is no longer the law. Nevertheless, it is not necessary to make that legal determination here because petitioner does not prevail even under the more stringent Gordon test.

III. THE VICINAGE ISSUE

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8. No discussion is necessary to find that, in our common law system, it is important that certain information or testimony be made to courts under penalty or perjury.

Petitioner is correct in asserting that the vicinage provision of the Sixth Amendment is important, Johnston v. United States, 351 U.S. 215 (1956), but she is mistaken with respect to its application. The Constitution only demands that the criminal trial be held at the "state and district" where the crime was committed; it does not purport to define the locale of the commission of various crimes.[9] It is perfectly within the rights of a state or the federal government to define the place of the commission of a crime -- even to define it in such a way that it can be committed in more than one place. See, e.g., United States v. Anderson, 328 U.S. 699 (1946). Petitioner presumes that the place of commission (or omission) for failure to file a tax return is Sacramento, California, merely because returns are ultimately processed there.

It is clear that California law allows for the prosecution of failure to file tax offenses in the county of residence. Cal. Rev. and Taxation Code § 19407. This venue provision is in complete agreement with vicinage decisions that hold the place where an act is to be performed is the proper vicinage for the prosecution of a crime. Johnston v. United States, supra. In United States v. Hoover, 139 F.Supp. 895 (W.D. Pa. 1955), affirmed 233 F.2d 870 (3rd Cir. 1956) an act of tax evasion was properly tried where the return was "signed and tendered,"

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9. Respondent attempts to raise an issue that the Sixth Amendment vicinage provisions do not apply to state crimes. Respondent claims "many cases" establish this fact. However, respondent does not cite to a single case. This court does not consider a matter at issue and subject to resolution by the court unless the party raising the issue makes some attempt to city authority.

and not where the return was "filed" with appropriate state agency.

In the present case, the only logical place for the failure to file a tax return is the locale where the return would have been prepared and tendered but for the criminal act of failing to tender it. Petitioner would assert that everyone fails to file a tax return must travel to Sacramento for a criminal trial with resultant great disruption in their personal lives, and at some considerable expense. Petitioner's contention would produce an absurd result. It completely lacks merit here.

IV. NO CONSTITUTIONAL ERROR OCCURRED IN PETITIONER'S ARRAIGNMENT

The trial court in a colloquy admirably summed up the type of case involving petitioner, and its simple issue:

> You don't have any oil drilling in Oklahoma. There's no issue of tax shelters. Basically, did you file, did you not file? Can the prosecution prove that?

RT September 20, 1989, 18:19-21.

Petitioner's feigned ignorance of the charges against her is frivolous. The misdemeanor complaint filed against petitioner (Appendix to Answer, Exhibit 1) notifies her of the statutory section violated, the date of violation, and a short, but informative description of the crime. The court told her at her first appearance that she was being prosecuted for failing to file tax returns. RT April 4, 1989. See also, RT August 29, 1989, 13:26-28. She had written letters prior to any formal charge attempting to convince the tax authorities that she was not obligated to file a tax return, see e.g., documents in Exhibit 6

(appendix to Answer).

This is not a case about a person who chose to plead guilty, but was not advised of all her rights, including the nature of the crime and the penalties involved. This is a case where a not guilty plea was entered on behalf of petitioner; she went to trial and was convicted. "The Sixth Amendment guarantees a criminal defendant a fundamental right 'to be informed of the nature and the cause of the accusation'" [citation omitted]. By including the elements of the offense, [a charging document] informs the defendant of the charges against him [citation omitted]." Lincoln v. Sunn, 807 F.2d 805 (9th Cir. 1987). While state statutes or court rules may require more than the constitutional minimum, the essence of the Sixth Amendment right to be given notice of the charges requires only that a defendant have the opportunity to prepare a defense to the charges on their merits. Obviously, such was the case here.

V. CONCLUSION

The court recommends that the petition for habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty days after being served with these findings and recommendations, any party may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Greenhow v. Secretary of Health and Human Services, 863 F.2d 633

(9th Cir. 1988).

DATED: August 28, 1991

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UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY S. MONTELEONE,

Petitioner,

vs.

MUNICIPAL COURT OF CALIFORNIA, et al.,

Respondents.

_____/

No. CIV S-90-1447 LKK GGP P

FINDINGS AND RECOMMENDATIONS

[Filed 8/30/91]

I. INTRODUCTION

Petitioner was convicted in state court (Solano County Municipal Court) on six counts of violations of the state Revenue and Taxation Code §§ 19406, 19401(a). After a lengthy pretrial process occasioned by continuances requested by petitioner to seek counsel, petitioner was compelled to represent himself. Petitioner chose not to participate at his trial. Petitioner was found guilty of wilfully failing to file state tax returns. All counts were prosecuted as misdemeanors; petitioner received three consecutive one year sentences. Petitioner also states that he was sentences to additional time in jail because he was unable to pay a fine (jail time imposed at a rate of $30.00/day). Petitioner's sentence per se is not

at issue in this habeas corpus petition.[1/]

Petitioner raises four issues in his habeas petition:

1. He was denied his Sixth Amendment right to counsel;

2. He was denied his First Amendment right to free exercise of religion (trial court refused to appoint counsel because petitioner would not "swear" to his financial condition when it violated his spiritual beliefs);

3. Petitioner's trial was held in violation of the vicinage rights of the Sixth Amendment;

4. Petitioner was improperly arraigned (Sixth Amendment).

The facts relating to each issue are set forth in individual sections. The state concedes exhaustion of the issues set forth in this petition. For the reasons given at length herein, the petition for habeas corpus should be denied.

II. THE SIXTH AMENDMENT RIGHT TO COUNSEL

A. Facts

The First Continuance

On October 9, 1988, complaint No. F84281CR was filed in Solano County Municipal Court. Appendix to Answer, Exhibit 1. Petitioner appeared for arraignment on April 6, 1989. During this short hearing, petitioner requested a continuance to seek counsel. He was advised that he was charged with six counts of failing to file a state income tax return and also given paperwork related

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1. Petitioner's wife was convicted of identical charges. She also was compelled to represent herself after numerous continuances had been granted for the purpose of acquiring counsel. She has filed a habeas petition almost identical to the one discussed here (CIV-S-90-1448 LKK). The Findings and Recommendations for that case will be filed separately.

to the charge. The matter was continued to May 11, 1989, so that he could appear with counsel. Appendix to Answer, Exhibit 3. RT April 6, 1989.[2/]

The Second Continuance

By June 1, 1989, petitioner still had not retained counsel. He explained to the court that he was "still in the process of working things out" with Mr. Fracchia as to defense, price, and whether Mr. Fracchia would even take the case. When the court asked when petitioner would have all the money together, petitioner indicated that the money was not the problem, it was whether Mr. Fracchia would take the case.
RT June 1, 1989.

The matter was continued to June 21, 1989, so that petitioner could get a lawyer.

The Fourth Continuance

Petitioner appeared on June 21, 1989. He indicated that he had in fact retained Robert Fracchia as counsel, but that counsel had not realized the hearing was set for that date. The court continued the matter until July 24, 1989. RT June 21, 1989.

The Fifth Continuance

On July 24, 1989, petitioner appeared without counsel. He stated that he was presently conferring with Robert Fracchia, but that he would not know more until Mr. Fracchia returned to town on August 8, 1989. Petitioner indicated that he had also contacted two more attorneys, Ron Peters and Ramond Sweeney. The court

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2. Unless otherwise indicated, the reporter's transcripts are contained within Exhibit 3 of the Appendix to the Respondents' Answer.

granted another continuance to August 14, 1989, the first available counsel plea day after Mr. Fracchia's return, and warned petitioner to "[m]ake sure you have an attorney here." RT July 24, 1989.

The Sixth Continuance

Petitioner appeared on August 14, 1989, without counsel. He stated that Mr. Fracchia would not take the case because of "serious disagreements" in the presentation of the defense." The court stated that "[t]his has gone on long enough," and entered a plea of not guilty and no time waiver on petitioner's behalf. The court warned petitioner that it would be to his disadvantage if he appeared without counsel at pretrial. Petitioner objected. Pretrial was set for August 24, 1989. RT August 14, 1989.

The case is set for Trial

On August 24, 1989, petitioner appeared in court without a lawyer. At that time, petitioner indicated that he wanted the court to appoint counsel for him. When petitioner stated that he made $2,800 a month, the court responded that he would not qualify for appointment of counsel. The trial judge became increasingly exasperated as petitioner explained the numerous letters he had sent and the replies he had received. The following ensued:

> The Court: You don't need replies... [T]here's 130,000 lawyers in California, probably 90,000 doing criminal defense who would love to take your money. All you do is walk into their office --
>
> Mr. Monteleone: There's a lot of competent counsel. I'm looking for counsel adequate and competent in the field of taxation...

> The Court: ...[T]he allegation doesn't require expertise, just filing a return. That's the issue. Pretty simple. There's no tax expertise needed in filing a return...

RT August 24, 1989 2:15-27.

When petitioner indicated that he had appointments set up with two more attorneys, the court stated:

> We can't go any further. The matter's been put over four times for counsel and plea. The matter started in April. You appear -- I mean, I've had the same type of thing with other people that are alleged tax protesters -- I don't know if you are -- but we've had the same problem, where they -- seven or eight counsel and pleas. Went through thousands of cases through this court in months, and the only cases I see where we have continuances, delaying tactics of seeking counsel, with 130,000 lawyers in California, and inability to find counsel, it in these type of cases. Another lady running through court, same as you. You and she are the only persons I've had in court who have sent out letters to attorneys instead of going to their offices.

RT August 24, 1989, 3:12-25. After indicating that he would set trial date, the trial judge stated that "[i]f you can't find counsel before that date, then I think the court has done everything possible..." RT August 24, 1989, 3:28 - 4:2. Later the court said "I don't buy the story you can't

find a lawyer". RT 3:26-27. The court then set jury trial for September 19, 1989, telling petitioner "[y]ou'll have plenty of time to hire a lawyer between that time." RT August 24, 1989, 6:9-10.

The Seventh Continuance

On September 19, 1989, petitioner and his wife appeared without counsel. Petitioner filed a disqualification motion against the trial judge, which under state law is automatically granted upon a first request. After discussing the counsel matter again, the jury trial was continued to the next day. RT September 19, 1989.

Trial

On September 20, 1989, petitioner appeared with his wife. When petitioner indicated he wished his request for appointment of counsel to be heard first, the court responded:

> It's obvious to the Court that what you were doing was, basically, delaying the Court process by indicating you were mailing letters out to attorneys. But in any event, it was the Court's feeling you did not intent (sic) to retain counsel; obvious you were doing nothing more than dealing with dilatory obstruction of process to delay this matter in Court... You've had until today to retain counsel.

RT September 20, 1989, 3:7-16.

At that point ensued a lengthy interaction between petitioner, his wife and the court. Neither petitioner nor his wife would sign the appointment of counsel form under penalty of perjury. No matter what word was suggested to describe what act would be performed by

signing the document, the act was found to be offensive to their (petitioner and his wife) religious beliefs. RT September 20, 1989, 6-23.

The court notes that petitioner herein executed the verification to his federal court habeas petition under penalty of perjury with no problem being raised. Petitioners were convicted at trial after refusing to participate in the trial.

Sentencing

Sentencing was continued by the trial court so that petitioner's wife could appear with counsel. RT September 20, 50:5-51. On October 3, 1989, the matter was again continued because the attorney did not appear. Petitioner's wife explained that her attorney was going to handle the "new trial" for them (assuming their motion was granted) -- she did not have the funds to retain him for the new trial motion. The matter was continued again to October 24, 1989, so that attorney Fallman could appear at the motion for new trial hearing and sentencing. RT October 3, 1989, p. 57-58. On October 24, 1989, petitioner appeared; his wife's attorney was in the courtroom but was not representing her because he would only represent her if she received a new trial. RT October 24, 1989, p. 59-61.

The sentencing judge denied the motion for new trial and proposed to place petitioner on probation and ninety days concurrent jail time if petitioner filed tax returns as a condition of probation. Petitioner refused on these terms and was thereafter sentenced to the maximum time permissible under state law.

B. The Trial Court Did Not Err In Refusing To Grant Any Further Continuances

The entire legal issue is summed up in the case of United States v. Kelm, 827 F.2d 1319 (9th Cir. 1987) (a failure to file tax return case):

> When a criminal defendant's constitutional right to secure counsel of his choice conflicts with the trial judge's discretionary power to deny continuances, the reviewing court must balance several factors in determining whether the trial court's conduct was "fair and reasonable." United States v. Studley, 783 F.2d 934, 938 (9th Cir. 1986). Where a defendant's conduct is "dilatory and hinders the efficient administration of justice," a court may deny a continuance even if it results in the defendant's being unrepresented at trial. United States v. Leavitt, 608 F.2d 1290, 1293 (9th Cir. 1979).

United States v. Kelm, 827 F.2d at 1322.

The factors set forth at footnote 2 of the Kelm opinion are: inconvenience to the witnesses, parties, court; whether other continuances have been granted; whether legitimate reasons exist for further continuances; whether the delay is defendant's fault; and prejudice to the defendant.

There does not need to be an extensive discussion of these factors in light of the factual record in this case. It is quite obvious that the prosecution and its witnesses were being inconvenienced as well as the court. Many

continuances had been granted. The trial court found that petitioner had been purposefully dilatory in his attempt to retain counsel. At first, petitioner represented that he had in fact retained counsel, then indicated that he wanted counsel appointed but refused to sign the financial declaration necessary for appointment. Finally, although the defendant was prejudiced in this self-representation, if this factor was dispositive, a trial court could never deny a continuance of trial when counsel had not been retained.

This court has never witnessed judicial patience of the sort exhibited by the Solano County bench. Petitioner's case was no rush to justice. Petitioner's habeas petition is completely lacking in merit on this ground.

C. The Trial Court Did Not Err In Refusing To Appoint Counsel

As referenced in the facts, petitioner at one time stated that "money was not the problem" in obtaining counsel. Despite this assertion, petitioner sought appointed counsel on the first of trial.

Petitioner does not contest, nor could he in a federal habeas petition, that state law required the signing of the financial form under penalty of perjury. Given that state law mandated the penalty of perjury requirement, the issue here is whether the Sixth Amendment is violated when counsel is not appointed on account of a defendant's failure to execute the form.

Several federal cases have grappled with this issue. United States v. Ellsworth, 547 F.2d 1096 (9th Cir. 1976); United States v. Gravatt, 868 F.2d 585 (3rd Cir. 1989); United States v. Saroun, 834 F.2d 1358 (7th Cir. 1987).

All three cases require defendants to fill out the financial affidavits under penalty of perjury, see, e.g. Gravatt, 868 F.2d at 591. The three cases recognized that information on the form could pose Fifth Amendment self-incrimination problems, but that those problems could be worked out by sealing the form or holding in camera hearings. Self-incrimination is not at issue in the present petition.[3/]

Thus, the only issue concerning execution of the financial affidavit is whether the trial judge unreasonably required a signature under the penalty of perjury. Both sides to this dispute cite Gordon v. State of Idaho, 778 F.2d 1397 (9th Cir. 1985)[4/] In Gordon, the trial court had dismissed a civil action because the plaintiff had refused to swear or affirm before testifying at his deposition. The Ninth Circuit reversed noting that when one's First Amendment rights run counter to governmental rules or policies, the government must use

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3. Although petitioner referenced a self-incrimination concern in the trial court, he did not exhaust the issue in his state habeas proceeding. This court has fully reviewed the papers filed with the California Supreme Court; the only issue raised with respect to appointed counsel is the issue concerning "swearing" to the accuracy of the form. This court cannot review an unexhausted issue that was not fairly presented to the California Supreme Court. Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986). This court offers no opinion on the outcome if the issue had been raised in the state habeas proceedings.

4. Respondents cited this case in the index of cases, but their brief is devoid of reference to the case. It appears that respondent's counsel did little more than copy the district attorney's brief in state court, and present it to this court. Moreover, respondents' general reliance on state cases in this federal habeas proceeding has been unhelpful.

the least restrictive means possible to accomplish its important policy in order for its rules to pass muster under a First Amendment analysis. The court held that a precise verbal formula was unnecessary to accomplish the purpose of impressing the witness with the need to tell the truth. However, not mentioned by petitioner, is the further holding of the court that an agreement by the plaintiff to testify under penalty of perjury with the knowledge that he could be prosecuted for perjury was appropriate. Gordon, 778 F.2d at 1401.

It is clear that the trial court only wanted the petitioner here to execute the financial declaration under penalty of perjury. The trial court suggested numerous ways for this to be accomplished. This colloquy occurred:

> Ms. Cummins-Monteleone [referring to the appointment of counsel for husband]: you will not give him counsel if he does not sign it under penalty of perjury?
>
> The Court: Right, because I can't verify that it is true.
>
> Ms. Cummins-Monteleone: You're saying that the only way you will give him counsel is for him to sign it under penalty of perjury?
>
> The Court: Right.
>
> Ms. Cummins-Monteleone: All right.
>
> The Court: That's the way it works. (Petitioner then went on stating that he wanted to sign it under duress).

RT September 20, 1989, 17:13-18.

***

> The Court: Do you understand that you're signing that under penalty of perjury? For the record, do you understand that?
> Mr. Monteleone: That's an unsworn statement. That's not--
> The Court: We can swear you and make it formal. I mean, I want to satisfy you. (emphasis added).
> Mr. Monteleone: I refuse...
>
> ***
>
> The Court: Let me ask you this: Do you understand, by signing this, that you're signing it under penalty of perjury?
> Mr. Monteleone: No, I don't.
> The Court: You don't understand it?
> Mr. Monteleone: No, I don't.
> The Court: What is it you don't understand?
> Mr. Monteleone: I understand that's a sworn statement, and you can't force me to take an oath.

RT September 20, 1989, 20:15-21:8.

This colloquy clearly demonstrates that the trial court was attempting to utilize the least restrictive means possible to accomplish the purpose of having the document executed under penalty of perjury. The trial court was willing to call it anything that the petitioner wanted. However, both petitioner and his wife (who were conferring together during this colloquy as reflected in the record) were simply not willing to perform any task that might get them counsel and get the trial started. The

court again notes that petitioner herein signed his petition to this court under penalty of perjury without any problem being raised in this action.[5/] This fact coupled with a review of the record clearly shows that petitioner was not being deprived of any First Amendment right when he was asked to sign the form under penalty of perjury.[6/]

Moreover, this court notes the recent Supreme Court case of Employment Div. of Human Resources v. Smith, 110 S.Ct. 1595 (1990), which significantly lightened the burden to be borne by a state when its law becomes entangled with a person's professed religious beliefs. It may well be that Gordon is no longer the law. Nevertheless, it is not necessary to make that legal determination here because petitioner does not prevail even under the more stringent Gordon test.

III. THE FIRST AMENDMENT ISSUE

Much of the discussion regarding the trial court's refusal to appoint counsel is subsumed under this heading as well. Indeed, the First Amendment issue is only relevant insofar as it impacted the Sixth Amendment right to counsel, i.e., criminal trials are not reversed on procedural grounds for First Amendment violations per se. In any event, the court does not that petitioner's representation now that he offered all along to sign under

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5. On appeal, petitioner was represented by a court-appointed Deputy Public Defender. In order to obtain counsel, petitioner signed under penalty of perjury a similar financial declaration to the one he refused to sign prior to trial. See Appendix to Answer, Exhibit 7.

6. No discussion is necessary to find that, in our common law system, it is important that certain information or testimony be made to courts under penalty of perjury.

penalty of perjury is directly contradicted by the record. See, e.g., colloquy quoted above under Section C. It is clear from a review of the entire record that when petitioner refused to take an oath, he also refused to declare under penalty of perjury. RT September 20, 12:12-23:23. For the reasons stated above, this claim does not have any merit.

III. THE VICINAGE ISSUE

Petitioner is correct in asserting that the vicinage provision of the Sixth Amendment is important, Johnston v. United States, 351 U.S. 215 (1956), but he is mistaken with respect to its application. The Constitution only demands that the criminal trial be held at the "state and district" where the crime was committed; it does not purport to define the locale of the commission of various crimes.[7] It is perfectly within the rights of a state or the federal government to define the place of the commission of a crime -- even to define it in such a way that it can be committed in more than one place. See, e.g., United States v. Anderson, 328 U.S. 699 (1946). Petitioner presumes that the place of commission (or omission) for failure to file a tax return is Sacramento, California, merely because returns are ultimately processed there.

It is clear that California law allows for the prosecution of failure to file tax offenses in the county of

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7. Respondent attempts to raise an issue that the Sixth Amendment vicinage provisions do not apply to state crimes. Respondent claims "many cases" establish this fact. However, respondent does not cite to a single case. This court does not consider a matter at issue and subject to resolution by the court unless the party raising the issue makes some attempt to city authority.

residence. Cal. Rev. and Taxation Code § 19407. This venue provision is in complete agreement with vicinage decisions that hold the place where an act is to be performed is the proper vicinage for the prosecution of a crime. Johnston v. United States, supra. In United States v. Hoover, 139 F.Supp. 895 (W.D. Pa. 1955), affirmed 233 F.2d 870 (3rd Cir. 1956) an act of tax evasion was properly tried where the return was "signed and tendered," and not where the return was "filed" with appropriate state agency.

In the present case, the only logical place for the failure to file a tax return is the locale where the return would have been prepared and tendered but for the criminal act of failing to tender it. Petitioner would assert that everyone fails to file a tax return must travel to Sacramento for a criminal trial with resultant great disruption in their personal lives, and at some considerable expense. Petitioner's contention would produce an absurd result. It completely lacks merit here.

IV. NO CONSTITUTIONAL ERROR OCCURRED IN PETITIONER'S ARRAIGNMENT

The trial court summed up the type of case involving petitioner, and its simple issue:

> The Court: ...[T]he allegation doesn't require expertise, just filing a return. That's the issue. Pretty simple. There's no tax expertise needed in filing a return...

RT August 24, 1989 2:15-27.

Petitioner's feigned ignorance of the charges against him is frivolous. The misdemeanor complaint filed against petitioner (Appendix to Answer, Exhibit 1) notifies him of the statutory section violated, the date of violation, and a

short, but informative description of the crime. The court told him at his first appearance that he was being prosecuted for failing to file tax returns. RT April 6, 1989. He had written letters prior to any formal charge attempting to convince the tax authorities that he was not obligated to file a tax return. See e.g., documents in Exhibit 6 (Appendix to Answer).

This is not a case about a person who chose to plead guilty, but was not advised of all his rights, including the nature of the crime and the penalties involved. This is a case where a not guilty plea was entered on behalf of petitioner; he went to trial and was convicted. "The Sixth Amendment guarantees a criminal defendant a fundamental right 'to be informed of the nature and the cause of the accusation'" [citation omitted]. By including the elements of the offense, [a charging document] informs the defendant of the charges against him [citation omitted]." Lincoln v. Sunn, 807 F.2d 805 (9th Cir. 1987). While state statutes or court rules may require more than the constitutional minimum, the essence of the Sixth Amendment right to be given notice of the charges requires only that a defendant have the opportunity to prepare a defense to the charges on their merits. Obviously, such was the case here.

V. CONCLUSION

The court recommends that the petition for habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty days after being served with these findings and recommendations, any party may file written

objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Greenhow v. Secretary of Health and Human Services, 863 F.2d 633 (9th Cir. 1988).

DATED: August 30, 1991

UNITED STATES MAGISTRATE JUDGE

APPENDIX C

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SOLANO

APPELLATE DEPARTMENT

* * * *

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

vs.

ANTHONY S. MONTELEONE,

Defendant/Appellant.

NO. FC28087

OPINION ON APPEAL

[Filed 8/20/90]

This is an appeal from a conviction of violations of Revenue and Taxation Code Section 19406 and 19401(a) after a jury trial in the Northern Solano Municipal Court. Oral argument came on regularly before the appellate department on July 25, 1990. Defendant/Appellant ANTHONY S. MONTELEONE appeared with Deputy Public Defender MARK ROELKE; Deputy District Attorney RENE WILCZYNSKI appeared for the People of the State of California, Plaintiff/Respondent herein.

Appellant claims four grounds on appeal:

1) The trial court abused its discretion in denying appellant a continuance for his counsel to be

present;

2) Solano County was the improper venue for the trial of the case;

3) Appellant was not properly arraigned; and

4) Abuse of sentencing discretion by the trial court.

A review of the record in this case shows that the trial court granted multiple continuances to the appellant to obtain counsel for trial but, despite the multiple continuances and passage of months of time, counsel was not forthcoming. The appellant attempted to abuse the judicial system and was not successful. The record does not reveal any error of law and the conviction is supported by the facts in the record. The appellant was sentenced within the statutory authority of the law. The trial judge gave the appellant the opportunity to mitigate his punishment, but he failed to do so. There is no abuse shown.

The judgment of the trial court is affirmed.

DATED: August 20, 1990.

JAMES F. MOELK,
PRESIDING JUDGE
APPELLATE DEPARTMENT

WE CONCUR:

DENNIS BUNTING, JUDGE

MICHAEL L. McINNIS, JUDGE

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SOLANO

APPELLATE DEPARTMENT

* * * *

THE PEOPLE OF THE STATE OF CALIFORNIA,	NO. FC28088
Plaintiff/Respondent,	OPINION ON APPEAL
vs.	
MARY ANN CUMMINS-MONTELEONE,	[Filed 8/20/90]
Defendant/Appellant.	

This is an appeal from a conviction of violations of Revenue and Taxation Code Section 19406 and 19401(a) after a jury trial in the Northern Solano Municipal Court. Oral argument came on regularly before the appellate department on July 25, 1990. Defendant/Appellant MARY ANN CUMMINS-MONTELEONE appeared with Deputy Public Defender MARK ROELKE; Deputy District Attorney RENE WILCZYNSKI appeared for the People of the State of California, Plaintiff/Respondent herein.

Appellant claims four grounds on appeal:

1) The trial court abused its discretion in denying appellant a continuance for his counsel to be present;

2) Solano County was the improper venue for the trial of the case;

3) Appellant was not properly arraigned; and

4) Abuse of sentencing discretion by the trial court.

A review of the record in this case shows that the trial court granted multiple continuances to the appellant to obtain counsel for trial but, despite the multiple continuances and passage of months of time, counsel was not forthcoming. The appellant attempted to abuse the judicial system and was not successful. The record does not reveal any error of law and the conviction is supported by the facts in the record. The appellant was sentenced within the statutory authority of the law. The trial judge gave the appellant the opportunity to mitigate her punishment, but she failed to do so. There is no abuse shown.

The judgment of the trial court is affirmed.

DATED: August 20, 1990.

JAMES F. MOELK,
PRESIDING JUDGE
APPELLATE DEPARTMENT

WE CONCUR:

DENNIS BUNTING, JUDGE

APPENDIX D

Defendant: Monteleone, Anthony
Docket # F84281-CR

6-15-93	LMV JW	Def. present w/out counsel. DA Driscoll. Def. indicates this matter has been calendared w/the Supreme Court.
B. CORDY, CSR		Statements made by Def. and the Court. Court orders CTS to satisfy fine as Def. spent one year in custody. Matter off calendar.
7-15-93	JW	Upon review of docket, no action was taken regarding the Restitution Fee of $1,456.76. Per Judge Villarreal, defendant is still responsible for the Restitution. Give Defendant until 6-15-94 to pay $1,456.76 to the Court; and notify defendant.
7-15-93	JW	Memo sent to defendant reflecting above; copy in file.
7-16-93	EW	A/R updated.

F84281CR K071693-01-0030
34 1456.76 a/r 1456.76

Defendant: Cummins-Monteleone, Mary Ann
Docket # F84282-CR

6-15-93 LMV JW Def. present w/out counsel. DA Driscoll.

B. CORDY, CSR Def. indicates that this matter has been calendared w/the Supreme Court.

Statements made by def. and the court. Court orders CTS to satisfy fine as def. spent one year in custody. Matter off calendar.

7-15-93 JW Upon review of docket, no action was taken regarding the Restitution Fee of $1,456.76. Per Judge Villarreal, defendant is still responsible for the Restitution Fee. Give Defendant until 6-15-94 to pay $1,456.76 to the Court; and notify defendant. Memo sent to defendant reflecting above. Copy in file.

F84282CR K071693-01-0019
34 1456.76 a/r 1456.76

Memo

From the Chambers of Judge Luis M. Villarreal

Date: 7-15-93

Re: CUMMINS-MONTELEONE, MARY ANN
Case No. F84282CR

Upon review of docket, no action was taken concerning the Restitution Fee owed to the Court in the amount of $1,456.76.

You did receive credit for time served against the $60,000 fine; however, you are still obligated to pay the Restitution Fee of $1,456.76, which will be due to the Court by; 6-15-94.

Memo

From the Chambers of Judge Luis M. Villarreal

Date: 7-15-94 [sic]

Re: MONTELEONE, ANTHONY S.
Case No. F84281

Upon review of docket, no action was taken concerning the Restitution Fee owed to the Court in the amount of $1,456.76.

You did receive credit for time served against the $60,000 fine; however, you are still obligated to pay the Restitution Fee of $1,456.76, which will be due to the Court by 6-15-94.

APPENDIX E

CALIFORNIA REVENUE AND TAXATION CODE § 19401

"Any person who does any of the following is liable for a penalty of not more than five thousand dollars ($5,000):

(a) With or without intent to evade any requirement of this part or any lawful requirement of the Franchise Tax Board under this part, fails to file any return or to supply any information required under this part, or who, with or without such intent, makes, renders, signs, or verifies any false or fraudulent return or statement, or supplies any false or fraudulent information.

(b) Aids, abets, advises, encourages, or counsels any individual to evade the tax imposed by this part by not filing any return or supplying any information required under this part, or, by making, rendering, signing, or verifying any false or fraudulent return or statement, or by supplying false or fraudulent information.

(c) Under this part, is required to pay any estimated tax or tax, who willfully fails to pay that estimated tax or tax, at the time or times required by law or regulations.

The penalty shall be recovered in the name of the people in any court of competent jurisdiction. Counsel for the Franchise Tax Board may, upon request of the district attorney or other prosecuting attorney, assist the prosecuting attorney in presenting the law or facts to recover the penalty at the trial of a criminal proceeding for violation of this section.

The person is also guilty of a misdemeanor and shall upon conviction be fined not to exceed five thousand dollars ($5,000) or be imprisoned not to exceed one year, or both, at the discretion of the court, together with costs of investigation and prosecution."

CALIFORNIA REVENUE AND TAXATION CODE
§ 19406

"Any person who, within the time required by or under the provisions of this part, willfully fails to file any return or to supply anyinformation with intent to evade any tax imposed by this part, or who, willfully and with like intent, makes, renders, signs, or verifies any false or fraudulent return or statement or supplies any false or fraudulent information, is punishable by imprisonment in the county jail not to exceed one year, or in the state prison, or by fine of not more than twenty thousand dollars ($20,000), or by both such fine and imprisonment, at the discretion of the court."

APPENDIX F

EXECUTIVE AND AGENCY ORDERS

United States Office of Government Ethics, *Standards of Ethical Conduct For Employees of the Executive Branch*, Part I, Executive Order 12674 (effective April 12, 1989) and 5 C.F.R. Part 2635, published at 57 Fed.Reg. 35006-35067 (Aug. 7, 1992):

Subpart A-General Provisions of *Basic Obligations of Public Service*, § 2635.101(b)(12) and § 2635.809 provide in part:

"Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those such as Federal, State, or local taxes that are imposed by law."

Department of Transportation Federal Aviation Administration's *Conduct and Discipline* manual, Chapter 3.

Chapter 3, § 300 provides in part:

FAA employees "must conduct themselves while off duty in a manner that will not cause the public to question their reliability and trustworthiness in carrying out their responsibilities as employees of the Federal Government."

Chapter 3, §305 (a) provides in part:

"All employees are expected to discharge their private financial obligations and to maintain a reputation in the community for honoring debts. Failure without sufficient excuse or reason to honor valid debts, including claims based on court judgments and tax delinquencies, or to make and adhere to reasonable arrangements for settlement, will constitute grounds for disciplinary action."